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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. [redacted] 109

EDWIN K. ATWOOD, ALICE B. ATWOOD, RUTH P. FISHER and THOMAS H. FISHER,

Petitioners,

vs.

GILBERT KERLIN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

EDWIN K. ATWOOD,
ALICE B. ATWOOD,
RUTH P. FISHER,
THOMAS H. FISHER,
Room 2125 Field Building,
135 South La Salle Street,
Chicago 3, Illinois,
RAndolph 6-7871,
Petitioners, Pro Se.

UNITED STATES LAW PRINTING CO., CHICAGO 18, ILL., LAkeview 5-6581

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EDWIN K. ATWOOD, ALICE B. ATWOOD, RUTH P. FISHER and THOMAS H. FISHER,

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vs.

GILBERT KERLIN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioners, Edwin K. Atwood, Alice B. Atwood, Ruth P. Fisher and Thomas H. Fisher, respectfully pray this Court's writ of certiorari to review and reverse the decision of the United States Court of Appeals for the Seventh Circuit in this case.

CITATIONS TO OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit in this case appears to be not yet reported. It is reprinted in full as Appendix I to this Petition.

The final judgment of the United States District Court for the Southern District of New York appealed from in this case is reprinted in full as Appendix II to this Petition. It is reported as 169 F. Supp. 134.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The opinion of the Court of Appeals was filed and its judgment was rendered on January 28, 1959. Petitioners' Petition for Rehearing was denied with a supplemental opinion on March 16, 1959. The Petition for Rehearing is reprinted in full as Appendix III and the supplemental opinion is printed in full as Appendix IV.

This Court's jurisdiction is invoked under Section 1254(1) of the United States Judicial Code (U.S.C.A. Tit. 28, Sec. 1254(1)), which confers upon this Court jurisdiction to review decisions of the United States Courts of Appeals.

THE QUESTIONS PRESENTED FOR REVIEW.

The questions for review are:

(1) Did the Court of Appeals err in affirming the judgment of the District Court, which was *summarily* entered without any trial or hearing on the merits in this trust-accounting suit brought by Petitioners, as beneficiaries of a trust against Respondent, as the trustee thereof, and which was based solely upon the trustee's unverified account of the trust funds held by him, and upon conflicting affidavits filed by Petitioners as beneficiaries of the trust, on the one hand, and by Respondent as trustee, on the other hand?

(2) Were Petitioners deprived of their right to their "day in court" and to due process of law under the 5th Amendment to the Federal Constitution because Petitioners were deprived by *summary* judgment of their right to discovery from Respondent under the Federal Rules and of their right to a trial "in open court" upon the merits of the issues raised by the pleadings as to the accuracy and propriety of the trustee's account?

STATEMENT OF THE CASE.

Petitioners filed this action as Plaintiffs in 1951 to compel Respondent, as trustee, to account to Petitioners, as beneficiaries of a trust, for the trust assets held by the trustee, and for other relief.

Upon the completion of certain litigation between the same parties in the State Courts of Texas (not relevant here), the trial judge, upon Petitioners' motion, ordered Respondent to file his trustee's account in this case within 30 days (76a-77a). This order directed Respondent to account to Petitioners "for the Plaintiffs' rights, title and interests" in certain properties held in trust for Petitioners by Respondent (76a).

Respondent filed his trustee's account within the 30-day period (77a-84a). Thereupon Petitioners duly filed their objections thereto (105a-109a). The trustee's account showed (84a) that Respondent owed Petitioners the sum of $15,105.82 under the trust agreement, *but Respondent failed to account (as Petitioners claim) for the entire corpus of the trust comprising some $170,000* (148a-152a). Petitioners' objections to Respondent's trust account included their demand that Respondent disclose the entire corpus of the trust, upon the ground that without such disclosure "It is impossible for this court or plaintiffs to know" if the trustee's account was correct (108a).

Respondent, however, moved the trial court

(a) To settle, approve and confirm his trustee's account and to overrule Petitioners' objections thereto, and

(b) For *summary* judgment under Federal Rule 12(b)(6) (109a-111a).

Thereupon both Petitioners and Respondent filed extensive conflicting affidavits dealing with the anticipated issues raised by the trustee's account.

Petitioners' affidavits set forth in detail the facts which (as Petitioners claim) showed that the trustee had acted in bad faith in concealing from Petitioners their ownership of a portion of the trust properties and in attempting over a long period of years to deprive Petitioners thereof. Petitioners' affidavits also showed that Respondent had received trust funds in the sum of $170,764.09, but had never accounted to Petitioners therefor (except insofar as Respondent had voluntarily charged himself with the sum of $15,105.82). Petitioners renewed in their affidavits their demands for a "day in court" by a trial in open court upon the merits of all of the accounting issues raised by their objections to Respondent's trustee's account.

Petitioners thus made it perfectly clear to the trial court that they were insisting that this case be *not* disposed of *summarily* upon the conflicting affidavits filed by the parties, but that on the contrary Plaintiffs were entitled to and were demanding their "day in court" by a trial in open court upon the merits of the account filed by Respondent, as trustee, and Petitioner's objections thereto.

On May 13, 1957, the trial judge filed a Memorandum (179a-193a). In his Memorandum the trial judge summarily ruled upon only three of Petitioners' numerous objections to the trustee's account (180a, 184a-186a); and without granting Petitioners any discovery by requiring Respondent to give his deposition or by requiring Respondent to produce any of his trustee's books, records and accounts, and without granting Petitioners their "day in court" by a trial in open court upon the merits of any

of the issues raised by Petitioners' objections to the trustee's account, the trial judge held that the three objections referred to were without merit (186a).

The trial judge concluded his Memorandum by saying (193a):

"It is time this litigation came to an end."

despite the fact that the trial judge by his own orders had deprived Petitioners of their efforts to obtain discovery from Respondent, and despite the fact that Petitioners had never had their "day in court" by a trial upon the merits of any of the conflicting issues raised by the trustee's account and by Petitioners' objections thereto.

Petitioners being dissatisfied with the trial judge's Memorandum, they timely filed their motion that they be granted their "day in court" by a trial in open court upon the merits (242a-271a).

On July 24, 1957, the trial judge entered the final *summary* judgment herein appealed from. The trial judge denied Petitioners' motion for discovery and inspection of relevant documents pursuant to Federal Rule 34; overruled Petitioners' objections to Respondent's account; confirmed the trustee's account; directed Respondent to pay Petitioners the sum of $16,656.07, by depositing the same with the Clerk of the District Court in the form of a certified check payable to Petitioners; and authorized the Clerk to deliver the check to Petitioners' attorneys upon receiving a satisfaction of said judgment. The final *summary* judgment further released Respondent of any further liability to Petitioners under the trust agreement, and retained jurisdiction to carry the *summary* judgment into final effect (280a-281a).

Petitioners timely appealed from the *summary* judgment to the United States Court of Appeals for the Second Circuit. In affirming the trial court's *summary* judgment, the Court of Appeals assumed the main issue in the case by stating in its opinion:

> "Defendant [Respondent] has fully disclosed all money [held by him as trustee] . . ."

The only conceivable basis for this assumption by the Court of Appeals, *i.e.*, that Respondent had fully disclosed all of the trust funds, was the trustee's unverified account and the trustee's self-serving affidavits. The accuracy of both the trustee's account and the trustee's affidavits was challenged by Petitioners' objections to the trustee's account and by Petitioners' affidavits.

The Court of Appeals said in its opinion that there were no "controverted facts", but merely disagreements as to the legal consequences of *admitted* facts, or disputes as to the legally correct interpretation of documents and exhibits. *This finding was simply untrue.* Every material fact in the trustee's account and in the trustee's self-serving affidavits was directly controverted by Petitioners' objections to the trustee's account and by Petitioners' affidavits.

The Court of Appeals further held that it found no evidence whatever of bad faith on Respondent's part. However, Petitioners' affidavits plainly disclosed bad faith on Respondent's part (56a-60a, 63a-70a, 113a-117a, 122a-126a, 132a-153a, 153a-179a, 193a-212a).

The Court of Appeals' opinion was no more than an incorrect statement that Petitioners had *agreed* (despite their repeated statements that they did *not* agree) that Respondent's trustee's account was complete and correct,

and that Petitioners had further *agreed* (though they did *not* agree) that Respondent was not guilty of any bad faith in administering the trust for Petitioners' benefit.

The Court of Appeals in effect overturned its prior decisions in *Subin* v. *Goldsmith*, 224 F. (2d) 753, cert. den. 350 U.S. 883, and *Alvado* v. *General Motors Corp.*, 229 F. (2d) 408, cert. den. 351 U.S. 983, and the other like cases decided by the United States Supreme Court and the other United States Courts of Appeals to which reference is made in the Argument below.

Petitioners expressly raised and relied upon their constitutional rights to their "day in court" as a part of their right to due process of law under the 5th Amendment to the Federal Constitution in their Reply Brief (p. 16) filed in the Court of Appeals. Under the sub-heading "Issues Raised on This Appeal Under the Federal Constitution", Petitioners stated that they were "deprived of due process of law under the 5th Amendment by the entry of the final summary judgment appealed from, because they were deprived thereby of their right to discovery from Defendant [Respondent] under the Federal Rules and of their right to a trial 'in open court' of the issues raised by the Complaint, as supplemented and amended, and by Defendant's [Respondent's] obligation to account as a fiduciary to Plaintiffs [Petitioners]" (264a, 266a).

REASONS RELIED ON FOR THE GRANTING OF THE WRIT.

Petitioners are admittedly beneficiaries, and Respondent is admittedly a trustee, of certain funds held by Respondent for Petitioners.

Petitioners' right to appeal to a court of equity for a settlement of the trustee's account, including Petitioners' right to a full disclosure from Respondent, as their trustee, not only of all of the admitted trust assets in the trustee's hands, but also of other assets claimed by Petitioners to be subject to the trust, is a right which has existed in the chancery courts for centuries, and which has never been heretofore doubted or disputed.

There can be no doubt or question in this case as to Respondent's obligation to account as trustee to Petitioners as beneficiaries of the trust, because the District Court ordered Respondent to file his trustee's account and because Respondent, as trustee, then did so (76a-77a).

The sole question on this appeal, therefore, is whether Petitioners may be deprived of their right to their "day in court" to have a full discovery and a trial on the merits in open court of their claims against the trustee, and to have a settlement of the trustee's account, by a *summary* judgment entered by the trial court (and affirmed on appeal) which has been based solely upon the trustee's unverified account and upon the trustee's self-serving affidavits, every material fact of which has been contradicted by Petitioners' affidavits.

Petitioners are not asking this Court to grant the writ of certiorari to determine any issue as to the accuracy of the trustee's account, but solely for the purpose of re-

versing the Court of Appeals and directing the trial court to vacate the *summary* judgment, upon the ground and only upon the ground that the District Court had no power or jurisdiction to enter a *summary* judgment in a trust accounting case, without granting the beneficiaries of the trust discovery and their "day in court" to determine the accuracy and validity of the trustee's account.

The *Subin* and *Alvado* cases to which reference is made in the Statement of the Case above set forth the salutary rule that a plaintiff shall never be deprived of his rights by a *summary* judgment in the trial court, *even if he files no counter-affidavits to those filed by the defendant*, where the facts in dispute are peculiarly within the defendant's own knowledge, especially where a question of the defendant's good faith is involved. *Subin* v. *Goldsmith*, 224 F. (2d) 753, cert. den. 350 U.S. 883; *Alvado* v. *General Motors Corp.*, 229 F. (2d) 408, cert. den. 351 U.S. 983. This salutary rule has been followed by this Court and by other Courts of Appeals. See, for example, *Colby* v. *Klune*, 178 F. (2d) 872; *Fogelson* v. *American Woolen Co., Inc.*, 170 F. (2d) 660; *Arnstein* v. *Porter*, 154 F. (2d) 464; *Doehler Metal Furniture Co.* v. *United States*, 149 F. (2d) 130; *Sartor* v. *Arkansas Natural Gas Co.*, 321 U.S. 620; *Kennedy* v. *Silas Mason Co.*, 334 U.S. 249.

In dealing with the *Subin* and *Alvado* cases, the Court of Appeals stated that the principle therein established was "completely inapplicable" to the case at bar, though for what reason is not disclosed in the Court of Appeals' opinion. The plain truth is that the judgment of affirmance in the case at bar in effect, though without saying so, reversed both the *Subin* and *Alvado* cases, as well as all of the other like cases decided by this Court and the other Courts of Appeals.

In their Petition for Rehearing, Petitioners expressly requested the appeals court to show how or why the principle of the *Subin* and *Alvado* cases was "completely inapplicable" to the case at bar or, alternatively, to state frankly that it was intending to reverse that principle in this case. This the appeals court refused to do in its supplemental opinion denying the Petition for Rehearing.

As if to add insult to injury, the Court of Appeals also said that *Petitioners'* "good faith is to be doubted", by quoting this expression in the trial court's Memorandum in a footnote to the opinion. The Court of Appeals did not, however, show in its opinion any ground either for upholding *Respondent's* good faith, or for doubting *Petitioners'* good faith, and ignored the fact that the documents and exhibits upon which these conclusions depended contained only controverted and disputed facts, and that Petitioners had been deprived by the *summary* judgment of their right to a trial in open court on the merits of the factual issues raised in the District Court.

As Petitioners pointed out in their Petition for Rehearing, it is now centuries too late for a court of chancery to charge trust beneficiaries with want of "good faith" *merely because they have asked the chancery court for a court accounting by their trustee.* Yet this is the only conceivable ground for the charge that Petitioners' "good faith is to be doubted."

There can be no doubt whatever that the Court of Appeals' decision affirming the *summary* judgment of the trial court deprived Petitioners of their "day in court" by compelling them to accept the trustee's account filed by Respondent *without any opportunity on Petitioners' part to test its accuracy or completeness by a trial in open court upon the merits in a court of equity.*

This Court will particularly note, from a reading of the Court of Appeals' opinion, how an attempt has been made therein to make it appear that Petitioners have *voluntarily surrendered* their rights to a trust accounting by Respondent, as their trustee, *when in truth and in fact Petitioners have never done any such thing*, as their objections to the trustee's account and their affidavits in opposition to the trustee's self-serving affidavits on the summary judgment motion conclusively show (105a-109a, 56a-60a, 63a-70a, 113a-117a, 122a-126a, 132a-153a, 153a-179a, 193a-212a).

In this case Petitioners have been deprived of their substantial property rights, as well as their right to procedural due process of law, in defiance of the provisions of the 5th Amendment to the Federal Constitution, for the reason that Petitioners have been prevented from having discovery and their "day in court" to test the accuracy of the trustee's account in a court of chancery, a right which existed unimpaired in such courts for centuries past.

Only by this Court's issuance of its writ of certiorari can this result be prevented.

CONCLUSION.

We recognize that the granting of the Petition for Certiorari is discretionary with the Court and that such writ will not be granted merely because of error by the District Court or the Court of Appeals unless such error contravenes fundamental Federal law.

In the case at bar, the violation of the Federal law is so plain and undeniable that Petitioners submit that they have been deprived of their fundamental rights under the 5th Amendment to the Federal Constitution.

PRAYER FOR THIS COURT'S WRIT OF CERTIORARI.

For reasons apparent from the record and stated in this Petition for Certiorari, Petitioners respectfully pray that this Court issue its writ of certiorari to review and reverse the judgment of the United States Court of Appeals for the Second Circuit in this case, with directions to that Court to reverse the *summary* judgment of the District Court and to grant Petitioners their constitutional rights to discovery and a trial in open court upon the merits of the trustee's account in due course.

Respectfully submitted,

EDWIN K. ATWOOD,
ALICE B. ATWOOD,
RUTH P. FISHER,
THOMAS H. FISHER,
Petitioners, Pro Se.

ARGUMENT.

When the history of 20th Century justice is finally written, it will be clear that the American courts have all too often given the American public only *theoretical* justice, not *actual* justice. Out of the American courts of appeal, both State and Federal pours an unending stream of reported and unreported opinions and decisions. These opinions carefully state "facts" and "legal conclusions" which fit them into the body of judicial precedent in a manner which is not inconsistent with the *theoretical* structure of our law. Thus we achieve *theoretical* justice.

But do we achieve *actual* justice? We do not. And why not? Because a vast number of the learned opinions and decisions of our Courts of Appeal are based upon supposed "facts" which never existed and supposed "issues" which were never raised in the manner described in the opinions of the judges.

There are several signs which will serve to warn the wary in this matter. When a legal opinion contains such a statement of the case as to indicate that the client and his attorney who urged it are nearly, if not absolutely, perfect imbeciles, it may safely be assumed that it is the Appeals Court which is misstating the "facts" and misconceiving the "issues", not the litigants who have been idiotic enough to have presented them. Similarly, if a losing party or his attorney is said to have *conceded* his case to his opponent by some written expression in his brief, or by some expression in oral argument, the chances are that the particular written or oral "admission" was never made but is based upon a plain distortion of the meaning intended by the author.

What has all this to do with this case? Just this: We have here a particularly clear example of an opinion by an Appeals Court which plainly is based entirely upon "facts" and issues which never existed, as well as upon supposed concessions and admissions of Petitioners as the losing litigants which were never made by them.

The principal question of fact is whether Respondent, as trustee, has fully disclosed all trust funds received by him in which Petitioners claim an interest as beneficiaries of his trust. Respondent had filed his trustee's account in which he discloses *only that portion of the trust funds* which he concedes he holds for Petitioner, *i.e.*, the sum of $15,105.82 (77a-84a). But Respondent has *refused* to disclose the balance of the trust funds, totaling some $170,764.09 (inclusive of the $15,105.82). The conflicting affidavits of the parties show that the principal dispute of fact between them is the nature and source of these entire funds totaling $170,764.09.

What does the Court of Appeals do with this question of fact? It says in its opinion:

> "Defendant [Respondent] had fully disclosed all money [held by him as trustee] . . ."

This statement is wholly and unqualifiedly contrary to the record. In fact, Respondent himself does not deny in his affidavits that he collected $170,764.09, but merely denies that Petitioners have any greater interest therein than $15,105.82. The Court of Appeals has abused its power by deciding the principal issue of fact adversely to Petitioners *without any justification whatsoever in the record.*

Another issue of fact raised by Petitions is whether Respondent, as trustee, is guilty of bad faith by actually and deliberately concealing from Petitioners the trust proper-

ties in which they claim an interest. The facts proving this actual and deliberate concealment are set forth in detail in Petitioners' affidavits. What does the Appeals Court do with these facts? It ignores them and thereby concludes that there is no showing of bad faith on Respondent's part.

But the opinion of the Appeals Court goes further. It pretends, *first*, that Petitioners have *themselves admitted* that there are no "controverted facts", and *second*, that Petitioners have *themselves agreed* that Respondent is not guilty of bad faith in administering the trust for Petitioners' benefit. *Thirdly*, the Appeals Court (albeit, in a footnote to its opinion) quotes with implied approval an expression in the trial court's Memorandum which says that *Petitioners'* "good faith is to be doubted".

Petitioners, however, have never made any such admission or agreement. Nor is there *any ground whatsoever* for the trial court's "doubt" as to Petitioners' "good faith", nor any justification for the reference thereto in the footnote of the Appeals Court's opinion.

As to the legal issues, the crucial one is whether a *summary* judgment is proper in a case brought by the beneficiaries of a trust against their trustee for a court settlement of his accounts, in which all of the material issues of fact are controverted by the conflicting affidavits of the parties. By a *summary* judgment is meant, of course, one which is NOT based upon a trial in open court of the disputed facts and issues, following discovery procedures under the Federal Rules by the litigants prior to the trial.

We shall not bother to cite to this Court the many decisions holding that procedural due process of law under the 5th and 14th Amendments compels the granting to

litigants of a "day in court" for just this purpose. Instead we point to the *Subin** and *Alvado*** cases cited in the Petition for Certiorari above, *which expressly held that a summary judgment is never proper in any case in which the facts in dispute are peculiarly within the opponent's knowledge*, especially where an issue of the opponent's good faith is involved, even if the opponent's affidavits asserting his own good faith are unchallenged.

What does the Appeals Court do with this crucial legal issue? It says that the principle of the *Subin* and *Alvado* cases is "completely inapplicable" to this case. **Why?** The Appeals Court not only fails to say why in its original opinion, but refuses to say why, when challenged in Petitioners' Petition for Rehearing, in its supplemental opinion.

The plain unvarnished truth is that the principle of the *Subin* and *Alvado* cases, as well as of all the other Federal cases to the same effect (cited above in the Petition), is *precisely applicable to this case*; and the Appeals Court would be utterly unable to show the contrary, if it should attempt to do so.

Thus we have in this case the perfect illustration of an Appeals Court's opinion which is based upon "facts" which never existed and issues of law which were never raised and upon "admissions" which were never made by the litigants.

Why, then, should this Court grant certiorari? Because it is the failure of the Courts of Appeals to grant litigants procedural due process of law in the sense here complained

*Subin v. Goldsmith, 224 F(2) 753, cert. den. 350 U.S. 883.

**Alvado v. General Motors Corp., 229 F.(2) 498, cert. den. 351 U.S. 583.

of which is the real reason for the breakdown in *actual*, as distinguished from *theoretical*, justice in this country. If this Court will take only a few of the multitudinous opportunities presented to it to grant certiorari for want of due process of law because of "facts" which never existed and legal issues which were never raised, and "admissions" which were never made, as found by the Courts of Appeal, there will be an electrifying improvement in *actual*, as distinguished from *theoretical*, justice in the U.S.A.

This is not a case in which the Court is asked to examine the record to discover whether there was a sufficiency of evidence at the trial to support the judgment below. This is a case in which there was *no trial*, and in which a *summary* judgment was rendered based upon conflicting affidavits *which contain no support for the judgment*, and upon "admissions" *which were never made by the losing litigants*. Thus there was no procedural due process of law in this case in the Constitutional sense. We therefore do not have here the situation in the recent case of *New York Life Insurance Company* v. *Dick*, in which Mr. Justice Frankfurter's dissenting opinion objects to this Court's granting certiorari "to examine records for sufficiency of evidence" following an actual trial on the merits in the trial court.

It may interest the Court to read the remarks of Lord Denning, one of the Lords of Appeal in the English House of Lords, delivered at Oxford on May 22, 1959. He said:

> "The House of Lords is more than another court of law. It is more than another court of appeal. It is the court of Parliament itself. It acts for the Queen as the fountain of justice in our land.

> *"It must, of course, correct errors that have been made by the courts below.* But it should do more. It lays down, or should lay down, the fundamental principles of the law to govern the people, and while adhering firmly to those principles *it should overrule particular precedents that it finds to be at variance with them.*
>
> "Then only shall we be able to claim that 'freedom broadens slowly down from precedent to precedent'."

The Court will note that correction of errors is the first consideration of the House of Lords, and only after that comes the establishing of precedents in accordance with fundamental principles, and the correction of erroneous precedents.

The case at bar is one in which this Court should seize the opportunity to grant certiorari.

Respectfully submitted,

EDWIN K. ATWOOD,
ALICE B. ATWOOD,
RUTH P. FISHER,
THOMAS H. FISHER,
Petitioners Pro Se.

APPENDIX I.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 19—October Term, 1958.

(Argued December 3, 1958 Decided January 28, 1959.)

Docket No. 24899

EDWIN K. ATWOOD, ALICE B. ATWOOD, RUTH P. FISHER and THOMAS H. FISHER,

Plaintiffs-Appellants,

—v.—

GILBERT KERLIN,

Defendant-Appellee.

Before:

SWAN, MEDINA and WATERMAN,

Circuit Judges.

Plaintiffs have appealed from a summary judgment of the United States District Court for the Southern District of New York, Sylvester J. Ryan, *Judge*, which approved defendant's account as "constructive trustee" under a quit claim deed covering land in Texas, awarded plaintiffs a judgment for $16,656.07, dismissed plaintiffs' supplemental complaint, and denied leave to file a proposed amendment thereto. Affirmed.

BOKAT & BOKAT, of New York, N. Y., *Attorneys for Appellants.*

MAC ILBURNE VAN VOORHIES, of New York, N. Y., *Attorney for Appellee.*

SWAN, *Circuit Judge*:

The judgment from which plaintiffs have appealed was entered, on defendant's motion, in a suit brought by plaintiffs on January 18, 1951, to establish the existence of an express trust under a quit claim deed from plaintiffs to defendant, dated March 19, 1945, describing land on Padre Island, Texas, to require defendant to account thereunder, to terminate the trust, and for other alternative relief. Federal jurisdiction rests on diversity of citizenship. 28 U.S. C.A. §§ 1332, 1391. Four days after the present suit was commenced, defendant Kerlin in Texas brought action against the present appellants and others to obtain an adjudication of the respective rights of the parties as to the land.[1] That suit was not finally terminated until the mandate of the Court of Civil Appeals was filed on December 12, 1955, opinion reported in *Fisher et al.* v. *Kerlin*, 279 S.W. 2d 637. In the meantime the present suit lay dormant.

Almost immediately after final decision in the Texas case, plaintiffs moved in the present suit for a summary judgment requiring defendant to account. By order of April 2, 1956 Judge Ryan directed defendant to file his account and directed plaintiffs to file their objections thereto, if any. This order was complied with, and on September 12, 1956 defendant moved for an order approving his

[1] Plaintiffs' efforts to enjoin prosecution of the Texas suit failed both before Judge Ryan and in this court, and need not be further adverted to.

account and dismissing, for failure to state a cause of action, plaintiffs' supplemental complaint filed subsequent to defendant's account. This motion, with numerous supporting and opposing affidavits, was fully considered by Judge Ryan, and was granted in a carefully reasoned opinion, dated May 13, 1957, which appears in 169 F. Supp. 135. The judgment on appeal was entered on July 29, 1957. Without reciting in detail all the terms of the judgment it will suffice to note that it approved defendant's account, awarded plaintiffs the indebtedness therein shown, $16,656.07, dismissed plaintiffs' supplemental complaint, and denied leave to file a proposed amendment thereto. No testimony was taken, the case being decided on the pleadings, voluminous affidavits and exhibits.[2]

It is conceded by both parties that all issues determined by the Texas action are *res judicata* in the present suit. Much of the voluminous record is concerned with background history of title litigation in Texas. A brief summary will suffice. In 1941 Kerlin filed a trespass to try title action in Cameron County, Texas, against the King Ranch, not a party to the present suit, and the present plaintiffs, for 6,000 acres of land referred to herein as the King tract and located at the southern end of Padre Island. During the pendency of that action, the United States Government commenced condemnation proceedings and took title to the King tract and also to a larger tract referred to herein as the Jones tract and located immediately to the north of the King tract. During 1941 the King

[2] Appellants' Appendix, which purports to comply with Rule 15(b) of this court and contains 287 printed pages, is a very inadequate presentation of the portions of the record essential to disposition of the issues raised by the appeal. The appellee has filed an Appendix of 246 printed pages.

Ranch and defendant settled the trespass action, and in 1945, plaintiffs and defendant agreed upon a similar settlement of their controversy, pursuant to which the quit claim deed of March 19, 1945 was delivered. Under the terms of the deed defendant Kerlin assumed the task of prosecuting plaintiffs' claims for an award in the pending Government condemnation proceeding. In 1950, he worked out an arrangement whereby the Government paid a small sum for the use of the land while the condemnation proceeding was pending and revested title to the King tract in Kerlin and title to the Jones tract in Kerlin and Jones jointly.

Immediately after the conclusion of that action, plaintiffs instituted the present suit in the District Court, and four days later Kerlin filed suit in Texas to obtain an adjudication of the rights of the parties under the 1945 quit claim deed. As the opinion in *Fisher* v. *Kerlin*, 279 S.W. 2d 637 makes clear, the Texas suit construed the quit claim deed, determined Kerlin's duties thereunder and the rights of the parties in the lands therein described and in money received by Kerlin from dealing with said lands. It decided that the present plaintiffs (referred to in the opinion as the Atwoods) had title to an undivided 1,000 acres out of the south 2,000 acres of the 6,000 acre King tract, and to an undivided 550.1 acres out of the 3,300.11 acre tract north of the 6,000 acre King tract. It also rendered judgment that the Atwoods recover a one-sixteenth royalty and one half of the bonuses and rentals paid to Kerlin on the south 2,000 acres of the 6,000 acre King tract and on the 550.1 acres of the acreage lying north of the King tract. Kerlin was left under the duty to account for money received from the United States under its condemnation proceedings, and from the lessees under two oil

and gas leases which he had made, one with Stanolind Oil & Gas Co., the other with Magnolia Petroleum Co. His account filed on May 1, 1956, was held by Judge Ryan to be a proper accounting for the money so received.

The appellants' brief presents their contentions under seven headings. Point I argues that the quit claim deed of March 19, 1945 created "An Express Inter Vivos Trust" in their favor. This argument is made notwithstanding the statement in the Texas opinion, 279 S.W. 2d 637 at 642: "We rest our decision upon constructive trust rather than an express trust." However, an affidavit submitted in opposition to defendant's motion to approve his account, states that in view of the Texas judgment "the sole and only questions undetermined under the Complaint and Supplemental Complaint are (a) the settlement of the account of the Defendant, Gilbert Kerlin, as trustee (whether as express or constructive trustee is irrelevant), and (b) a determination of Kerlin's liability, if any, under Plaintiffs' Supplemental Complaint."[3]

In Point II appellants argue their right to "a day in court." Their brief asserts (page 28) that the primary question involved on their appeal is whether entering a summary judgment deprived them "of their right to their 'day in court' by a trial upon the merits of the Trustee's account, as well as the other issues raised in Plaintiffs' pleadings." They rely strongly upon the principle enunciated in *Subin* v. *Goldsmith*, 2 Cir. 224 F. 2d 753, 758 cert. den. 350 U.S. 883, and similar cases, holding that where controverted facts are peculiarly within one party's knowledge and a question of such party's good faith is involved, a summary judgment in his favor without trial is improper. This principle is completely inapplicable to the case at bar. In disposing of the objections to the account, Judge Ryan

[3] Appellants' App. 216a.

held that no hearing was necessary since the objections could be determined by reference to the documents and exhibits submitted, none of which was in dispute.[4] Despite appellants' assertion that "every crucial fact in the respective affidavits * * * is directly controverted and contradicted" nowhere do they state what those facts are nor what specific issue requires a trial. So far as we can ascertain from a study of the record there are no "controverted facts," merely disagreements as to the legal consequences of admitted facts, or disputes as to the legally correct interpretation of documents and exhibits. Nor do we find any evidence whatever of bad faith on the part of defendant, despite plaintiffs' vociferous charges of breaches of trust, malicious prosecution, conspiracy, and slander of title. Indeed, if either party's good faith is to be doubted, there seems more reason to doubt the plaintiffs'.[5]

Point III claims that defendant committed a breach of trust by failing to include in the Stanolind and Magnolia leases a provision requiring payment directly to them of the royalties to which the Texas court later found them to be entitled. However, even on the assumption that failure

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[4] Appellee's brief states that the documentary evidence upon which Judge Ryan acted consisted of: the record in the present action; copy of the judgment in the Government's condemnation suit; opinion of the Texas Court of Civil Appeals in **Fisher v. Kerlin**, 279 S.W. 2d 637; copies of the Texas judgment fixing extent of appellants' rights under their quit claim deed to appellee; copies of two written oil and gas leases filed of record in Texas; and other undisputed documents set out in appellee's affidavits in support of the motion.

Appellants' reply brief does not dispute this.

[5] Judge Ryan characterized their objections to the account as follows:

> "I find it hard to believe that these objections so patently without merit were taken with a purpose other than to harass and annoy defendant."

to provide for direct payment was a violation of defendant's duty as a fiduciary, appellants suffered no damage from such failure, because no royalties were ever realized and the leases have ended.

Point IV is predicated on appellants' contention that under the Stanolind lease defendant was obligated to collect one dollar per acre delay rental in 1953 and failed to do so. Judge Ryan's opinion construed the lease, correctly we think, as not requiring the lessee to make such payment. We have nothing to add to his discussion.

In Point V appellants claim a breach of trust by defendant which entitles them not only to the money received for their benefit but also [redacted] interest thereon. Prior to the date of plaintiffs' 1945 quit claim deed to Kerlin, he asserts that he had acquired title to certain lands on Padre Island for himself and other interested persons for whom he acted as trustee, but not on behalf of any of the appellants.[6] They do not deny this assertion. Nevertheless they make the extraordinary claim that defendant must account for "the entire corpus of the trust estate," *i.e.* the total amount of money held by him as a trustee, asserted by them to be more than $170,000. although only part is held as trustee for them and the rest as trustee for a separate and independent group of beneficiaries, and that thereby they become entitled to obtain out of the total of both trusts reimbursements for outlays and attorney's fees incurred by them in the Texas litigation.[7] We fail to understand on what theory plaintiffs can demand that defendant account to them for that portion of cash received which he holds in trust for others and in which the appellants have no interest. No authority supporting

[6] Appellee's App. 54a.

[7] Appellants' App. 151a(28).

such theory has been called to our attention. Appellants' brief asserts (page 14) that without such disclosure it is impossible for the court or plaintiffs to know if the trustee's account is correct. This is not so. Defendant has fully disclosed all money received from the Texas lands. The way in which plaintiffs' share in the total cash received by defendant was determined in his account, namely apportionment on the basis of total acreage, is perfectly understandable and is in accordance with the Texas Court's judgment.

Under Point V the appellants' brief, which we find highly confusing, argues that defendant committed additional breaches of trust which justified allowing them interest. They argue (page 37) that defendant's account filed on May 1, 1956 admitted receipt of $5,552.09 under the Magnolia lease and that defendant was not diligent in paying it to them but actually "concealed" its existence while "attempting by litigation to despoil plaintiffs of their concealed property." This claim is little short of ridiculous in view of the fact that defendant was conducting the Texas litigation in good faith and won in the trial court.

Appellants also claim that defendant should also pay interest because checks he sent them were improperly drawn. But they were drawn in accordance with appellant Fisher's instructions and defendant agreed in writing that they might be cashed without prejudice to appellants' contentions. Finally appellants claim interest because defendant procured an order from Judge Ryan that the checks previously delivered but never cashed, be impounded with the Clerk of the District Court. In view of the circumstances this order seems well justified and certainly affords no basis for awarding appellants interest.

Point VI presents the contention that defendant committed a breach of trust in prosecuting the Texas litigation and entitled them to damages for malicious prosecution. In view of defendant's success in this litigation, the contention is wholly lacking in merit. It is adequately discussed in Judge Ryan's opinion.

Appellants' Point VII objects to the quit claim deed which the judgment below directed defendant to execute and record. The primary objection is that Kerlin's deed reserves to him and his legal representatives the power to make mineral leases in the future without the joinder or consent of appellants. It is conceded that their 1945 quit claim deed gave Kerlin and his heirs or assigns such power, but they contend that the judgment in the Texas action terminated it, and that the deed required by the judgment below is erroneous in restoring it to Kerlin. They have misconstrued the Texas judgment. The opinion expressly states, 279 S. W. 2d 637, 647: "The rights of the parties are controlled by the settlement agreement," *i.e.* by the 1945 quit claim deed. Other highly technical verbal criticisms of Kerlin's deed also appear to have no merit. But in as much as appellee's brief states that he is willing to execute a new deed following the wording suggested by appellants if the differences are of any substance, our affirmance will be without prejudice to an application to Judge Ryan to order execution of a new deed by Kerlin if in his discretion it seems desirable.

Judgment affirmed.

APPENDIX II.

EDWIN K. ATWOOD, ALICE B. ATWOOD, RUTH P. FISHER and THOMAS H. FISHER

Plaintiffs,

vs.

GILBERT KERLIN,

Defendant.

United States District Court S. D. New York May 13, 1957.

Bokat & Bokat, New York City, Edmund W. Bokat, New York City, for plaintiffs.

Macy burne Van Voorhies, New York City, for defendant.

RYAN, District Judge.

Following adjudication by the Texas court of plaintiffs' and defendant's respective rights to certain lands located in that state, defendant was ordered by this court to file his account in accordance with the judgment, in Texas. This was done on May 1956 and objections were filed by plaintiffs as was a supplemental complaint adding two counts to the original complaint pending here. Nothing further was done until September 1956 when defendant brought on the present motions for an order (a) settling his account and dismissing plaintiffs' objections and directing entry of judgment for plaintiffs in the amount accounted for, and (b) dismissing the supplemental complaint and entering judgment for defendant. Before decision of these motions plaintiffs moved for an order (a) requiring defendant to pay certain costs and attorney's fees incurred by plaintiffs in connection with the motions (Fed. Rules Civ. Proc. rule 56(g), 28 U.S.C.A.) (b) for leave to file an amended supplemental complaint adding

two more counts to the supplemental complaint and requiring defendant to answer; (c) for leave to inspect and copy documents in defendant's possession (rule 34); and (d) for leave to file certain affidavits (rule 56(e. g.)).

I deny plaintiffs' motion under Rule 56(g) as being obviously without merit; that under 56(c, 1), is granted and all the papers submitted are considered; motion under Rule 34 is denied in view of the ultimate disposition of the motion for leave to amend the complaint which is denied.

The objections to the accounting originally filed were numerous but they have now been reduced to 3 items—totaling $31,960.37—and alleging failure to account; (1) for $1,000 delay rental for the year 1953-54 under the Stanolind Oil & Gas Lease; (2) for $15,854.55 delay rental under the Stanolind and Magnolia Oil & Gas Leases; and (3) for failure to pay over $15,105.82 bonus and delay rentals under both leases for the years 1950-55 as shown in the account.

Before determining the merit of these objections and of the claims pleaded in the supplemental complaint and the proposed amendment, it is necessary that I go back to the filing of the original complaint in January, 1951, and the events which preceded it. This suit has been before me on several occasions (opinions—4/17/51, 12/11/51, 10/2/51 (mem.) reviewed on appeal 11/26/51, 1/22/51 (C. A. 2, no opinions just memoranda decisions).

Sometime in 1950 a dispute arose between the parties as to the effect of a quitclaim deed executed by plaintiffs to defendant on March 19, 1945, conveying land known as the King 6,000 acre tract. It was contended by plaintiffs that defendant took plaintiffs' share in the property in trust for the prosecuting of a claim to a condemnation award and that defendant was required to account for the

land or its value. It was defendant's position that title was completely vested in him, as a result of the reconveyance by the Government in lieu of an award, and that he was to account only in the event that he sold the property —which he had not done. In order to resolve this difficulty plaintiffs in January, 1951 instituted the present suit in this court seeking in the first count a termination of the trust created by the 1945 instrument and praying for an order settling defendant's account; and in the second count seeking to restrain defendant from adjudicating the issue of title in any other court; and in the third count seeking to compel defendant to file a current account in the event the trust was not declared terminated. Immediately thereafter defendant as plaintiff filed an action in trespass to try title in the District Court of Cameron County, 103rd Judicial District of Texas—Kerlin *vs.* Fisher *et al.*, Cause No. 28491—against these plaintiffs seeking an adjudication of their respective rights in this land situated there. Plaintiffs then moved in this court for partial summary judgment under their complaint requiring defendant to account, terminating the trust and asking for an injunction to restrain the prosecution of the Texas suit. This motion was denied in a memorandum opinion of April 17, 1951 and I then stated that the Texas suit appeared to be "a thoroughly appropriate vehicle to adjudicate the question of title to and ownership of" the lands in question. In the Texas suit plaintiffs filed a cross-claim alleging that the King tract by reason of an award and settlement had increased to 16,200 acres and seeking to recover an undivided one-half interest in it. On May 3, 1954, the district court of Cameron County filed its decision sustaining defendant's title to the tract by conveyance from the Government and holding that plaintiffs reserved merely a vendors' lien which entitled them to: one-half of any money

received by defendant in the event of sale of the south 2,000 acres of the tract and a 1/16 royalty and ½ of all rentals under leases on the property; it non-suited plaintiffs in their cross-claim. On appeal by plaintiffs the Court of Civil Appeals, 4th Supreme Judicial District of Texas, on May 4, 1955 (Fisher *v.* Kerlin, Tex. Civ. App., 279 S.W. 2d 637) reversed the trial court to the extent that it held defendant to be a constructive trustee of the 6,000 acre tract, that plaintiffs had title to "an undivided 1,000 acres out of the south 2,000 acres of the 'King 6,000 acre tract'; and an undivided 550.2 acres out of 3,300.11 acres undivided out of a larger tract of 6,600.22 acres lying north of said 'King 6,000 acre tract' ", (this represented plaintiffs' share in the excess lands received by defendant on the settlement over the condemnation), "together with a 1/16 royalty and one-half of the bonuses and rentals paid on the south 2,000 acres of the 'King 6,000 acre tract' and one-half of the bonuses and rentals out of 1,100.5 acres out of the 6,600.22 acre tract lying north of said 'King 6,000 acre tract';" and affirmed so much of the judgment as was not in conflict with its opinion.

The final judgment of the trial court of May 3, 1954, the "corrected judgment" of the Court of Civil Appeals of December 7, 1955 and the mandate of that Court filed on December 12, 1955, constitute the final judgment and certified copies have been filed on this motion.

Relying on the judgment of the Texas court plaintiffs in February 1956 moved this court for partial summary judgment under Count one of their complaint. I granted this to the extent of directing defendant to file his account and plaintiffs their objections and directed deposit by plaintiffs with the court of all checks received on account by them from defendant. On May 11, 1956, the supplemental complaint was filed without opposition.

It is now conceded by plaintiffs that the original complaint has become moot by the judgment of the Texas court; it is their position however that the supplemental complaint and the amendment should be allowed, because the findings of that court and the objections to the account reveal breaches of trust by defendant for which he should be surcharged, by way of paying counsel fees, litigation expenses and interest on the money admittedly and allegedly due under the account.

I take up first the objections to the account. These may be disposed of without a hearing as they can be determined only by reference to the documents and exhibits submitted, none of which are in dispute.

The alleged failure of defendant to account for $1,000 delay rental is predicated on plaintiffs' contention that under the Stanolind Lease (Ex. 4) defendant was required to collect from the lessee a $1 per acre delay rental on July 25th of each year unless prior thereto the lessee released the property. A release to 6,000 acres was executed by Stanolind on July 21, 1953 (Ex. 5) but it is argued that this was void because it was not recorded with the Clerk of Cameron County until July 30, 1953—and that therefore defendant breached his trust by failing to collect this money from Stanolind. A reading of paragraph 4 of the lease reveals the frivolity of this objection. It is there provided that the lessee may at any time be relieved of his obligation to pay this delay rental by executing and delivering to the lessor or placing of record the release to any portion of the property thereby surrendering the lease as to such property. Nowhere is there a requirement that recording be had by a fixed date; on the contrary the time limitation is to the effect that unless the lessee pay the delay rental by a time certain the lease as to this portion shall terminate. Even assuming the lessee had a positive

obligation to affirmatively terminate or continue liable it is difficult to conceive what more it could have done; it sent a telegram on July 23 to the defendant terminating the lease (Ex. 10); it filed the release on July 30 and it did not pay the rental by July 25. This was certainly conclusive surrender of the lease.

The next objection is based on a statement made by the defendant in paragraph of his moving affidavit, to wit, that since the filing of his account on May 1, 1956, he had received on June 22, 1956, under the Stanolind lease a delay rental of $1 per acre and that "plaintiffs are entitled to receive $7,244.22 thereof"; and that on July 23, 1956, he had received under the Magnolia lease a delay rental of $1 per acre and that "plaintiffs are entitled to $8,610.33 thereof * * * which should be taken into account in the order settling the account, as filed and directing the entry of judgment accordingly." This, the defendant points out is an obvious error on his part, for these figures represent the total annual delay rental out of which plaintiffs are to receive but their share for the year 1956, *viz.*: $115.01 under the Stanolind lease and $1,435.24 under the Magnolia —a total of $1,550.25 and not $15,854.55 as claimed by plaintiffs. That this is the total received by defendant is evidenced by the two checks deposited by the lessees to his account (Exs. 11 and 12) and from the schedule (Ex. 8) and the account and supporting affidavit filed by defendant showing total amounts received over a period of years under these leases and plaintiffs' *pro rata* share. Plaintiffs do not dispute the accuracy of any of these computations for the two prior years when their share was the same as in 1956; they do not urge that there has been any change in the terms of the lease, as a matter of fact, they give no reason for stating that they are suddenly entitled to so much greater an amount—other than to quote defend-

ant's error. Moreover in reaching the figure due them under the account for all past years, payment of which they claim under their third objection, they rely on these very computations. The ground of their third objection is that although there is no dispute as to the figures shown, the trustee should not credit himself with checks delivered to plaintiffs on account of their share of rentals and bonuses since these checks are in the hands of the Court and they have not received the proceeds. Clearly, they are entitled to be paid these amounts and defendant acknowledges his indebtedness in this regard.

I find it hard to believe that these objections so patently without merit were taken with a purpose other than to harass and annoy the defendant. They are overruled. The account is settled, approved and confirmed as amended to include the additional sum of $1,550.25 due plaintiffs and the amount of the checks on deposit in this court and of the lost check, totaling $11098.81, and judgment is directed to be entered in favor of plaintiffs for this amount.

This brings me to a consideration of the claims pleaded in the supplemental and proposed amended complaint. Out of a welter of confused and repetitious allegations one claim emerges and that is that plaintiffs seek to recover interest, counsel fees and expenses and unspecified damages from defendant.

Count IV is to the effect that the judgment of the Texas court establishes a breach of trust by defendant in wrongfully withholding plaintiffs' property from them, for which defendant should be held to pay "such moneys as may appear to be due with legal interest" and "special damages and exemplary and punitive damages," plus fees and expenses incurred by plaintiffs in defending and cross-claiming in the Texas suit. Count V pleads a conspiracy between defendant and unknown persons to breach the trust

(in an unspecified manner) and prays that the court "grant discovery of all such other persons and will enter judgment for damage to plaintiffs caused by the conspiracy." Count VI alleges that the prosecution of the Texas suit was done maliciously and without probable cause and that as a result plaintiffs were deprived of the use of their land and that for this defendant should be directed to reimburse plaintiffs for their attorney's fees and expenses; here, no damages are alleged. Count VII pleads a slander and clouding of title on plaintiffs' land by the filing of the Texas suit and by the filing of the leases which should have provided for payment of the 1/16 royalty on 1,550.2 acres directly to plaintiffs as lessors instead of to defendant as lessor. All this it is pleaded has resulted in a deprivation of the enjoyment of their land by plaintiffs for which defendant should pay exemplary, compensatory and special damages in no specified amount.

It is admitted by defendant that now that the Court of Appeals in Texas has adjudicated plaintiffs' rights to this tract an assignment of their royalty interest under the leases should be made by him, and that he is perfectly willing to do so in compliance with a direction from the court to this effect. It is also admitted by plaintiffs that no royalties have become payable on this particular tract and that there is nothing for which defendant should account.

It is elementary that under American jurisprudence counsel fees are not recoverable except by contract, statute or in equity where a fund has been created—and even in those instances it is the estate or fund which bears the cost—not the adversary. None of these conditions are here present.

It is obvious that all four counts are premised on the assumption that defendant as trustee of an express trust in resisting plaintiffs' demands and filing suit unjustifiably withheld property clearly belonging to the beneficiaries of the trust for which he should be surcharged to the extent of paying interest on the property and indemnifying plaintiffs for the expenses of litigation.

Whatever might be the liability of a malfeasing trustee who has wrongfully withheld (*Crutcher* v. *Joyce*, 10 Cir., 146 F. 2d 518, relied on by plaintiffs; *Cf. Matter of Bloomingdale's Estate*, 169 Misc. 968, 9 N.Y.S. 2d 333, affirmed 258 App. Div. 881, 17 N.Y.S. 2d 395; Surrogate's Court Act, § 231) we have no parallel situation here. True, it is that the Court of Texas held defendant to be a "constructive trustee" of the lands quitclaimed by plaintiffs, but that can be regarded as further proof that the deed of 1945 did not create an express trust. In denying plaintiffs' motion for summary judgment, I held that the instrument "did not establish a trust so unambiguously as to preclude parol evidence to elucidate the intent of the parties and give the instrument its proper construction." This was borne out by the views expressed by the Texas trial and appellate courts respectively. A fundamental issue and one bitterly contested here and there was title to and ownership of lands; this certainly does not paint a picture of an avaricious trustee bein ; forced to disgorge illegally retained property at the expense of his *cestui que* trust.

Nor can plaintiffs fare any better under the allegations of Count VI. The two absolutely essential requirements to the maintenance of a suit for malicious prosecution are not only not alleged, they are non-existent. Not only was defendant (plaintiff in that suit) victorious in the trial court and plaintiffs defeated in their cross-claim negating

the lack of probable cause aspect, but there was no interference with plaintiffs' property resulting in actionable damage. *Hauser v. Bartow*, 273 N.Y. 370, 7 N.E. 2d 268; *Lockett v. Cohen*, D.C.S.D.N.Y., ... F. Supp. .....; *Willard v. Holmes, Booth & Haydens*, 142 N.Y. 492, 37 N.E. 480; *Schulman v. Modern Industrial Bank*, 266 App. Div. 833, 43 N.Y.S. 2d 509; *Serxner v. Elgart*, 196 Misc. 1053, 94 N.Y.S. 2d 731. Even if I were to read the allegations of Count VII as an awkward attempt to plead interference with plaintiffs' property (and I very much doubt that this is the interference contemplated by the cases), by plaintiffs' own admission they have suffered no damage from such interference. At most it would be *injuria absque damnum*. Moreover as a claim for slander of title standing alone Count VII cannot stand, for it is essential to the maintenance of such a suit that special damage be alleged and proved. *Stuart v. Anti-Defamation League*, Sup., 127 N.Y.S. 2d 362; *Joseph v. Siegel*, Sup., 103 N.Y.S. 2d 557; *Frawley Chemical Corp. v. A. P. Larson Co.*, 274 App. Div. 643, 86 N.Y.S. 2d 710.

Assuming that the institution of the suit by defendant in Texas was groundless, malicious, false, fraudulent, even a breach of fiduciary duty, I know of no case in New York jurisprudence which permits the recovery, with nothing more, of costs and expenses in an independent action as damages. As recently as July, 1956 the Court of Appeals of New York in *Doyle v. Allstate Ins. Co.*, 1 N.Y. 2d 439, 154 N.Y.S. 2d 10, 14, 136 N.E. 2d 484, refused to permit the plaintiff to recover legal fees and expenses incurred in litigation as damages either general or special even though they were recognized "a loss in a sense resulting from the wrongful act of the defendant". It restated the general rule that taxable costs are considered adequate recompense and that even these are not to be in-

cluded in damages but are to be recovered in the taxation and consequently no evidence as to such costs would be relevant on trial (1 N.Y. 2d at page 444, 154 N.Y.S. 2d at page 14, 136 N.E. 2d at page 487). The facts in that case could not have been more favorable to permitting plaintiff to recover his costs and fees, and while he was permitted to recover expenses incurred in defense of an action which by contract his insurer should have defended, he was not permitted to recover the expenses incurred in the present suit. The Court stated that it had found no authority permitting such recovery, and reaffirmed the rule that time, effort and money expended in litigation are the consequences of every suit. *J. J. Theatres, Inc.* v. *V. R. O. K. Co.*, Sup., 96 N.Y.S. 2d 271.

Finally, I come to the question of interest on the amounts due plaintiffs under the account and the judgment. Obviously what I have said above precluded recovery of interest from the trustee on the theory of wrongful withholding. Even an express trustee—and defendant was not one—who in good faith resists the demands of his *cestui* although ultimately he may have to pay the demand, will not be surcharged by way of having to add interest out of his pocket to his account. *Matter of Barnes*, 140 N.Y. 468, 35 N.E. 653; Restatement Law of Trusts, Sec. 207, Com. C, p. 568. The principle behind a trustee's liability for interest is to charge him with the profits made by him through the unauthorized use of trust funds, or with the profits that he should have made for the *cestui's* benefit had he employed the funds in obedience to directions in the trust instrument. See Bogert on Trusts, Sec. 157, 3d Ed. It is not so much a matter of punishing the trustee for breach of duty as it is of compensating the beneficiary for the loss in the value of his property, where the fund has not been put to use, or for the increase in its value

where the trustee has made a profit out of it. *In re Ayvazian's Estate*, 153 Misc. 467, 275 N.Y.S. 123, upon which plaintiffs place great stress serves but to point up the difference between reasonable doubt and such gross delinquency as to amount to misconduct. There trustees who had diverted trust funds to the payment of personal obligations and held a legacy for thirteen years without making any effort to distribute were held accountable for interest. It is significant that even in that situation the costs and disbursements of the proceedings were charged to the estate and not to the trustees personally.

Here, defendant was diligent in paying over to plaintiffs those sums as to which there was no dispute, expressly stating that receipt by plaintiffs was to be without prejudice to the additional sums they were contending for under the deed. (Ex. 9) That plaintiffs received no benefit from these checks was their own fault, for they could have cashed them. When in the Texas litigation plaintiffs counterclaimed for a larger amount, defendant was justified in withholding payment, and immediately following the filing of the mandate of the Court of Appeals of Texas he sent plaintiffs a further check in payment of their share as finally adjudicated. The bonus payments and delay rental due under both leases were in accordance with the terms thereof deposited in a special checking account where they earned no interest. The delay from the time defendant filed his account last May to the entry of judgment and the paying over to plaintiffs of the amounts due under them the account and the judgment has been occasioned by plaintiffs' frivolous objections and their numerous motions filed as late as December, 1956. For this defendant should not be held liable.

Count V, I read as an attempt to plead a conspiracy between defendant and others to institute the suit complained of in the other counts. I have held that that suit was justified, but even were it not I know of no theory of law which permits an action otherwise not maintainable, to be brought where conspiracy is alleged. *Luckett* v. *Cohen, supra; Munson Line* v. *Green,* D.C., 6 F.R.D. 14, appeal dismissed 2 Cir., 165 F. 2d 321:; *J. J. Theatres, Inc.* v. *V. R. O. K. Co., supra.*

I might add that the deed of March 19, 1945, provides that there is to be no personal liability on the said trustee except for a due accounting and a division of the moneys actually received by him on that account.

Defendant's motion is granted; the supplemental complaint and the proposed amendment raise no factual issues; the pleadings as a matter of law fail to state a claim upon which relief can be granted; the objections which plaintiffs incorporate in the pleadings are sham. *Marks Music Corp.* v. *Continental Record Co.,* 2 Cir., 1955, 222 F. 2d 488; *Irving Trust Co.* v. *United States,* 2 Cir., 1955, 221 F. 2d 303:; *Furgiele* v. *Disabled American Veterans Service Foundation,* D.C., 116 F. Supp. 375, affirmed 2 Cir., 1953, 207 F. 2d 957; *River Plate and Brazil Conferences* v. *Pressed Steel Car Co.,* 2 Cir., 1955, 227 F. 2d 60. Supplemental complaint is dismissed and leave to file the amendment is denied.

It is time this litigation came to an end. Submit judgment on notice giving effect to the account as amended and settled.

APPENDIX III.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 24,899

EDWIN K. ATWOOD, ALICE B. ATWOOD, RUTH P. FISHER and THOMAS H. FISHER,

Plaintiffs-Appellants,

vs.

GILBERT KERLIN,

Defendant-Appellee.

PETITION FOR REHEARING.

I.

This Court's opinion is completely erroneous "upon the principle enunciated in *Subin* v. *Goldsmith*, 2 Cir. 224 F. (2d) 753, 758, cert. den. 350 U.S. 883, and similar cases, holding that where controverted facts are peculiarly within one party's knowledge and a question of such party's good faith is involved, a summary judgment in his favor without trial is improper" (as such principle is stated in this Court's opinion page 405).

Despite this Court's statement (p. 405) that: "This principle is completely inapplicable to the case at bar", the truth is that the principle of the *Subin* case is *precisely applicable to the case at bar*, and in effect (though without

saying so) this Court's opinion reverses the *Subin* and *Alvado* cases (*Alvado* v. *General Motors Corp.*, 229 F. (2d) 408, cert. den. 351 U.S. 983), and the other like cases decided by this and other Federal Courts (which cases are cited in the *Subin* and *Alvado* cases and on page 30 of Appellants' Brief).

The principle of the *Subin* case is that in suits where a plaintiff's case depends upon a determination of facts which are peculiarly within the defendant's knowledge and a question of the defendant's good faith is involved (as in the case at bar, since this is a suit by plaintiff-beneficiaries of an express or constructive trust against the defendant-trustee) no summary judgment will be rendered in favor of the defendant (and if one is rendered, it will be reversed on appeal), *despite the affidavits or other documentary evidence offered by the defendant to support the summary judgment, and whether or not such affidavits and other documentary evidence are controverted or uncontroverted by the plaintiff.*

In the *Subin* case, the plaintiff sued as a corporate stockholder for an injunction preventing his corporation and its officers from entering into a contract. (As in the case at bar, there was therefore a fiduciary relationship between the plaintiff and the defendants, and the good faith of the defendants was involved.) The defendants offered four affidavits, two of which were by their own attorneys, but which were not based on "personal knowledge" and therefore violated Federal Rule 56(e). Another affidavit was irrelevant and a fourth affidavit contained hearsay and consequently was not "competent" evidence under Federal Rule 56(e). (Exactly similarly in the case at bar, Kerlin's affidavits violated Federal Rule 56(e), not being based on personal knowledge (Appellee's Appendix, p. 3a-7a, 11a-12a, 160a-161a, 162a-163a, 164a-184a, 109a-203a, 203a-212a,

213a-218a, 218a-235a) and being little more than briefs filled with hearsay and other incompetent evidence. (Appellants' Appendix, p. 250a-251a).) In deciding the *Subin* case, however, this Court did not base its decision upon the defects in the defendants' affidavits.

In reversing the summary judgment in the defendants' favor in the *Subin* case, this Court cited its earlier decisions holding (p. 758) that where "the plaintiff must rely for his case on what can draw out of the defendant" and where the defendant's "good faith" is involved, the fact that the plaintiff had failed to file counter-affidavits controverting the defendants' affidavits "has no significance" (p. 760), and therefore the summary judgment must be reversed *even if the defendants' affidavits were uncontroverted and on their face would have justified a decision in their favor.*

In the *Alvado* case, this Court again held (p. 412) that where a defendant's affidavits relate to facts which are peculiarly within defendant's own knowledge and his "good faith" is involved, the granting of a summary judgment is erroneous and will be reversed, citing the *Subin* and other cases relied upon therein. This Court said (p. 412):

> "In such circumstances (especially where, as here, *such a matter as good faith*, or the like, is crucial), the granting of a summary judgment is error. For the opponent of the motion [for summary judgment] is thereby deprived of the opportunity to cross-examine the movant's officials, and is prevented from having a trial court assisted in its evaluation of their credibility by observing their demeanor while they testify. See, *e.g.*, *Colby* v. *Klune*, 2 Cir., 178 F. (2d) 872; *Bozant* v. *Bank of New York*, 2 Cir., 156 F. (2d) 787, 790; *Subin* v. *Goldsmith*, 2 Cir., 224 F. (2d) 753, 767, cert. den. 76 S. Ct. 1361; *Alabama Great Southern*

R. Co. v. *Louisville & Nashville R. Co.*, 5 Cir., 224 F. (2d) 1, 5. In *Subin* v. *Goldsmith, supra*, we explained why, in such a case, the failure of the opponent of the motion to file a counter-affidavit has no significance [citing *Alabama Great Southern R. Co.* v. *Louisville & Nashville R. Co.*, 5 Cir., 224 F. (2d) 1, 5, as adopting and following the rule in the *Subin* case]. (Italics added.)

We think, therefore, that plaintiff is entitled to a trial on the issue . . ."

* * * *

"Reversed with directions to conduct a trial in accordance with this opinion."

The situation in the case at bar is *identical* to that in the *Subin* and *Alvado* cases and falls *precisely* within the principle of those two decisions by this Court. The whole point of our appeal is that without a trial in open court Plaintiffs do not know and cannot know, and the trial and appeal courts do not know and cannot know, whether or not the Defendant Trustee (Kerlin) did or did not account for all the money he received (a question of *fact*) from Plaintiffs' Texas lands adjudicated to them in the Texas Court of Civil Appeals, (see Plaintiffs' objections to the Trustee's account appearing on pages 105a-108a of Appellants' Appendix).

This Court says in its opinion (p. 407):

"Defendant has fully disclosed all money received from the Texas lands."

THIS ASSUMES THE MAIN ISSUE IN THE CASE. *Subin* and *Alvado* both say that Plaintiffs do not have to take Defendant's word for it, especially as an examination of his Trustee's Account will show (Appellants' Appendix, p. 77a-82a) that Kerlin did not base the same on his personal knowledge, so that the account itself fails to conform with Federal Rule 56(e).

Similarly, this Court's opinion says (p. 406-7):

> "Prior to the date of plaintiff's 1945 quit claim deed to Kerlin, he *asserts* that he had acquired title to certain lands on Padre Island for himself and other interested persons for whom he acted as trustee, but not on behalf of any of the appellants. *They do not deny this assertion.*" (Italics added.)

Whether or not Plaintiffs do deny this assertion (and they do deny it), the *Subin* and *Alvado* cases hold that Kerlin should be compelled *at a trial of the case in open Court* to disclose the facts as to any other interested parties for whom he claims to be acting as Trustee. *Moreover, it is simply not true that Plaintiffs do not deny this assertion.* In Plaintiffs' Objections to the Defendant's Account as Trustee, Plaintiffs *expressly objected* to the Trustee's account upon the ground that Defendant had failed to account for "the entire corpus of the trust estate in which plaintiffs are interested", and upon the ground that therefore the Trustee "should be required by order of this Court to disclose the entire corpus of the trust estate, together with all income or receipts of the Trustee, Gilbert Kerlin, so that it may be disclosed to this Court and to Plaintiffs whether the Trustee, Gilbert Kerlin, is liable for any breaches of trust, either through failure to collect the assets of said trust estate, or for any losses to said trust estate, or for any claimed deductions or expenses charged to said trustee estate, or otherwise. *Without said disclosure it is impossible for this Court or Plaintiffs to know whether the statements made in the affidavit of Gilbert Kerlin of May 1, 1956 attached to said Trustee's account or the alleged computations and receipts appearing on pages 1 and 2 of said Trustee's account are correct*" (App. 108a).

Throughout Appellants' Brief and Reply Brief, Plaintiffs persistently denied Kerlin's assertion that he had acquired title under the quitclaim deed from Plaintiffs on

behalf of "other interested persons for whom he acted as trustee". For example, on page 7 of Appellants' Brief, Plaintiffs objected to Defendant's contention that he had been vested with title to the lands and minerals owned by Plaintiffs "as trustee for certain undisclosed beneficiaries, not including, however, the Plaintiffs herein (32a-33a)." In other words, the statement in this Court's opinion (p. 406-7) that Plaintiffs do not deny Kerlin's assertion "that he had acquired title to [Plaintiffs'] lands on Padre Island for himself and other interested persons for whom he acted as trustee, but not on behalf of any of the appellants", is simply untrue.

What this Court does in its opinion is to put words into the mouths of Plaintiffs *which are simply not there and which are contrary to their expressed contention throughout this case.* Plaintiffs have *not* conceded that Defendant has fully disclosed all money received from their Texas lands or accounted therefor. They have charged *exactly the contrary* (105a-108a). Plaintiffs have *not* conceded that Kerlin acquired title to the lands of Padre Island on behalf of himself and *other persons* for whom he acted as trustee, but *not* on behalf of Plaintiffs.

Similarly, the erroneous statement is made at the top of page 406 of this Court's opinion:

> "So far as we can ascertain from a study of the record, there are no 'controverted facts', merely disagreements as to the legal consequences of *admitted facts*, or disputes as to the legally correct interpretation of documents and exhibits. Nor do we find any evidence whatever of bad faith on the part of defendant, . . . " (Italics added.)

From these statements it would appear that the Court has failed to read Plaintiffs' affidavits appearing on pages 56a-60a, 63a-70a, 113a-117a, 122a-126a, 132a-153a, 153a-179a, 193a-212a of the Appendix to Appellants' Brief.

These affidavits *do* disclose bad faith on the part of Defendant as constructive or express Trustee, and are *not* limited to "legal consequences of *admitted facts*, or disputes as to the legally correct interpretation of documents and exhibits".

But whether or not Plaintiffs' affidavits controvert Defendant's affidavits as to "good faith" or otherwise, under the principle of both the *Subin* and *Alvado* cases this is irrelevant and "has no significance". The summary judgment entered by Judge Ryan deprives Plaintiffs of their right to their "day in court" by a trial upon the *factual* merits of the Trustee's account, as well as the other *factual* issues such as Defendants' "good faith" which are raised in Plaintiffs' pleadings, as this Court correctly says in its opinion is Plaintiffs' position (p. 405).

The Court's opinion is no more than an incorrect statement that Plaintiffs agree (despite their repeated statements that they do *not* agree) that Defendant's account is complete and correct, and also agree (though they do *not* agree) that Defendant is not guilty of any bad faith in conducting the Texas litigation and in administering the corpus of the trust of which Defendant is concededly a fiduciary for Plaintiffs' benefit.

This Court should, if it is to adhere to its order of affirmance, re-write the opinion and frankly state that it is reversing the *Subin* and *Alvado* cases, or at least show why the principle of these cases does not apply, based upon something other than Plaintiffs' supposed agreement to "admitted facts" *with which Plaintiffs have never agreed.*

II.

This Court's opinion (p. 404) contains *an important error of fact* which appears to be inadvertent. In the 19th and 20th lines from the top of this page, this Court says

that the Texas Court of Civil Appeals "rendered judgment that the Atwoods recover a one-sixteenth royalty and one-half of the bonuses and rentals . . . *on the 550.1 acres of the acreage lying north of the King tract*". The figure of 550.1 acres is erroneous. As the Texas Court of Civil Appeals' judgment squarely states (App. 75a), Plaintiffs were adjudged to be the owners of a one-sixteenth royalty and one-half of the bonuses and rentals "out of 1,100.5 acres out of the 6,600.22 acre tract lying north of said 'King 6,000 acre tract' ". (See Appellee's Appendix, page 44a and also page 163a).

While this erroneous description of 550.1 acres (instead of the correct area of 1,100.5 acres) may seem of little moment to the Court, it has considerable importance to Appellants, because it is always conceivable that some future erroneous contention might be based upon this misinterpretation of the Texas Court judgment, which might have the illegal effect of depriving Plaintiffs of one-half of their 1,100.5 mineral acres which were actually adjudged to them after five years of litigation in Texas.

We most earnestly ask this Court to correct *this obviously inadvertent error* in its opinion.

III.

The Court's opinion holds (p. 408) that Defendant is not liable to pay Plaintiffs' interest on moneys withheld from Plaintiffs because "of *the fact* that defendant was conducting the Texas litigation *in good faith*". But this is a "fact" which is *challenged and disproven* in Plaintiffs' affidavits. Moreover, this Court also says (p. 408) that Defendant is not liable for damages for malicious prosecution of the Texas litigation, because, "in view of *defendant's success* in this [Texas] litigation, the contention is wholly lacking in merit." Just how this Court

can reach the erroneous conclusion that Defendant had "success" in the Texas litigation is beyond our comprehension, since in the Texas litigation *Plaintiffs* won the undisputed title to 1,500.2 surface acres and the undisputed title to 1,100.5 mineral acres, to which Defendant *unsuccessfully claimed* to be the sole owner of the title.

Plaintiffs agree that the question whether Defendant conducted the Texas litigation "in good faith" is a question of "fact", and say that, even if this "fact" were *not* contested in the affidavits (though it *is* contested in Plaintiffs' affidavits), nevertheless the summary judgment should be reversed under the principle of the *Subin* and *Alvado* cases, because both those cases expressly say that where "such a matter as *good faith*" is involved, it cannot be determined by a *summary* judgment.

CONCLUSION.

If this Court intends to overturn the *Subin* and *Alvado* principle in this case, then Plaintiffs earnestly submit that this Court is not plainly saying so in its opinion. If it is not overturning *Subin* and *Alvado*, then it fails to show why. But to put words in Plaintiffs' mouths to the effect that Plaintiffs are not disputing the hearsay and other statements in Defendant's documents filed in support of the motion for summary judgment, and then to use this erroneously presumed concession as the basis for the holding that the *Subin* and *Alvado* principle is not applicable to this case, is no more than an utter and complete distortion of Plaintiffs' whole purpose and position in this litigation.

That this Court is accepting Judge Ryan's rejection of the principle of the *Subin* and *Alvado* cases is plainly shown on page 406 of the Court's opinion. In the top

paragraph, this Court says that, without any trial on the merits and based on "documents and exhibits," *Plaintiffs'* "good faith is to be *doubted.*" In the footnote this Court quotes without approval Judge Ryan's statement that Plaintiffs' objections to the trustee's account are "so patently without merit" as to indicate that their purpose was none other than "to harrass and annoy defendant". In the light of *Subin* and *Alvado,* how can this Court not only uphold Defendant's "good faith" but also doubt Plaintiffs' "good faith" on the basis of "documents and exhibits" when these questions depend upon issues of fact which are disputed and which have never been decided in the trial court by a trial on the merits?

What this comes down to is castigating Plaintiffs for having filed an action in equity, under its ancient jurisdiction in such matters, asking to have a court accounting by their trustee of trust funds to which Plaintiffs are entitled, as a result of which the trial court has awarded Plaintiffs a judgment for $16,656.07 against the defaulting trustee.

It is surely centuries too late to castigate any trust beneficiary *merely because he asks for a court accounting* in equity and successfully prosecutes to judgment a claim against a defaulting trustee, especially one who, like Kerlin in the case at bar, has brought offensive litigation against his beneficiaries, *after* the beneficiary's accounting suit was filed, *in the unsuccessful effort to deprive Plaintiffs of their entire title to their trust property.*

There can be no doubt whatever that this Court's decision deprives Plaintiffs of their "day in Court" and compels Plaintiffs to accept the Defendant trustee's accounting, without any opportunity to test in a court of equity its accuracy or completeness. If the *Subin* and *Alvado* cases

are still law in this Court, then Plaintiffs have been deprived of their fundamental equitable rights established under those decisions. By the use of language designed to make the reader believe that Plaintiffs have voluntarily surrendered their rights, when in truth and in fact Plaintiffs have never done any such thing, this Court in its opinion gives a completely erroneous impression of what this case is all about.

It is one thing for this Court to render a decision which deprives Plaintiffs of their rights on grounds which are comprehensible, and which are not based on assumed admissions and concessions which Plaintiffs have never made. It is another thing to render an opinion which completely distorts the record and particularly Plaintiffs' position throughout this litigation, when their position is certainly no different from that of the position of the plaintiffs in the *Subin* and *Alvado* cases.

It is earnestly requested that this Court reconsider this matter in the light of what is said both in Appellants' Briefs and above in this Petition, and reverse the judgment appealed from to the end that Plaintiffs may have their "day in court" under the principle or the *Subin* and *Alvado* cases, which in turn is based upon fundamental principles of equity established for centuries.

Alternatively, it is earnestly requested that if the judgment appealed from is to be affirmed, then this Court should re-write its opinion and plainly state that the *Subin* and *Alvado* principle is no longer law or show why it is not applicable for reasons other than erroneously presumed concessions to which Plaintiffs have never acceded.

In any event, it is earnestly requested that the erroneous figure of 550.1 acres appearing in the 20th line on page 404 of the Court's opinion be corrected to read 1,100.5 acres.

Respectfully submitted,

BOKAT & BOKAT
By EDMUND W. BOKAT
347 Madison Avenue
New York 17, New York
Attorneys for Plaintiffs

APPENDIX IV.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 19—October Term, 1958.
(Petition filed February 13, 1959 Decided March 16, 1959.)

Docket No. 24899

EDWIN K. ATWOOD, ALICE B. ATWOOD, RUTH P. FISHER AND THOMAS H. FISHER,

Plaintiffs-Appellants,

—v.—

GILBERT KERLIN,

Defendant-Appellee.

Before:

SWAN, MEDINA and WATERMAN, *Circuit Judges.*

On Petition for Rehearing.

BOKAT & BOKAT, of New York, N.Y., *Attorneys for Plaintiffs-Appellants.*

PER CURIAM:

The appellants contend that our opinion misinterpreted the judgment of the Texas Court of Civil Appeals, and that this "might have the illegal effect of depriving them of one half of their 1100.5 mineral acres which were actually adjudged to them after five years of litigation in Texas." We think their fears are unjustified. Our opinion makes obvious that we accept the Texas Court judgment as hav-

ing determined the rights of the parties. However, we may have been too elliptical in attempting to summarize what the Texas Court held at page 647 of 279 S. W. 2d, as amended by its memorandum opinion filed on December 7, 1955 (Appellee's Appendix, pp. 39a-40a). Accordingly we will substitute for the sentence to which the appellants object, the following: It also rendered judgment that the Atwoods recover a one-sixteenth royalty and one-half of the bonuses and rentals paid on the south 2000 acres of the 6000 acre King tract; and one-half of the bonuses and rentals paid on 1100.5 acres out of the 6600.22 acre tract lying north of said King 6000 acre tract.

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Supreme Court of the United States

OCTOBER TERM, 1958

No. 993

EDWIN K. ATWOOD, ALICE B. ATWOOD, RUTH P. FISHER and THOMAS H. FISHER,

Petitioners.

—against—

GILBERT KERLIN,

Respondent.

BRIEF OPPOSING CERTIORARI

MacIlburne Van Voorhies
Counsel for Respondent
No. 20 Exchange Place
New York 5, New York

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Respondent.

BRIEF OPPOSING CERTIORARI

Question Presented

Respondent disagrees, completely, with the Petitioners' statement of the Questions Presented for Review (Pet. p. 3) and respectfully submits that the Petition presents, in fact, only the following Question:

(1) Where the rights of the parties in and to certain lands in Texas, have, after extensive litigation there, been fixed and determined by a final judgment of the Texas courts (through the Supreme Court of that State)—

May Petitioners, who were adverse parties in the Texas action and who disagree with the result reached there—demand, as a matter of Constitutional right—a retrial of all of their contentions, in a suit in equity

brought in another jurisdiction (the Southern District of New York)—or may the latter Court determine Petitioners' rights by a summary judgment, where whatever rights Petitioners have, are fixed and determined by: the Texas judgment; two written oil leases (both filed of record in Texas); and other indisputable and undisputed documentary evidence?

Statement

Honorable Sylvester J. Ryan, before whom this case had appeared on several previous occasions (Pet. Appdx. II, 11a), was thoroughly familiar with the questions it presented before he granted the summary judgment from which Petitioners appeal.

This action relates to the rights of the parties in certain Texas lands. It was commenced January 18, 1951, in the District Court. After a flurry of unsuccessful activity by Petitioners in the District Court and the Court of Appeals, Second Circuit (Pet. Appdx. I, 2a; Appdx. II, 11a, 12a), the case lay dormant, pending the trial and determination of a Texas action between the same parties (Pet. Appdx. I, 2a). The Texas action involved much the same subject matter, and was appealed to the Supreme Court of Texas (*Fisher, et al.* v. *Kerlin*, 279 S. W. 2d 637 [Texas Civ. App. 1955, rehearing and leave to appeal both denied]).

Finally, after the rights of the parties in and to the Texas lands and their respective oil, gas and other mineral interests therein, had been adjudicated by the Texas courts, Judge Ryan, of the Southern District of New York, on the basis of that Texas

judgment and other *undisputed documentary evidence*, granted a summary judgment herein: settling Respondent's account; dismissing Petitioners' Supplemental Complaint; and denying Petitioners leave to amend their Supplemental Complaint by adding two additional counts, Six and Seven, thereto.

In support of this disposition of Petitioners' case, Judge Ryan handed down a carefully detailed opinion in which he disposed of each of Petitioners' contentions (*Atwood, et al* v. *Kerlin*, 169 F. S. 135 [S. D. N. Y. 1957] (Pet. Appdx. II, 10a-22a). The Court of Appeals for the Second Circuit affirmed Judge Ryan's disposition of the case, with a unanimous opinion, which fully supports the decision of the District Court on every point (— F. 2d — [2 Cir. 1959], Pet. Appdx. I, 1a-9a, rehearing — F. 2d — [2 Cir. 1959], Pet. Appdx. IV, 35a-36a).

We respectfully refer this Court to the two opinions below, for an accurate summary of the facts and law applicable to this case, both of which are ignored and completely disregarded in the Petition for Certiorari.

POINT I

The judgment below was entered upon undisputed documentary evidence.

Although the Petition throughout insists that Petitioners have been deprived of their "day in court" in this equity case; and although Petitioners claim that: "Every material fact in the trustee's account and in the trustee's self-serving affidavits was directly con-

troverted by Petitioners' objections to the . . . account and by Petitioners' affidavits" (Pet. p. 7); the fact is that the judgment below was based entirely upon *undisputed documentary evidence.*

Below, the Petitioners admitted that all issues but one in their original complaint were rendered moot by the Texas judgment (A. 214a-215a).* They admitted, further (A. 216a) that:

> ". . . *the sole and only questions* undetermined under the Complaint and Supplemental Complaint are (a) the settlement of the account of the Defendant Kerlin, as Trustee (whether as express or constructive trustee is irrelevant), and (b) a determination of Kerlin's liability, if any, under Plaintiffs' Supplemental Complaint." (Italics by Petitioners.)

Petitioners' objections to Respondent's account (A. 105a-109a) were overruled, Judge Ryan saying (Pet. Appdx. II, 14a):

> "I take up first the objections to the account. These may be disposed of without a hearing as they can be determined only by reference to the documents and exhibits submitted, none of which are in dispute."

The documentary evidence upon which Judge Ryan acted in granting that summary judgment consisted of:

(a) The Court Record in this action;

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* References to Petitioners' Appendix below are designated "A.", with the appropriate page numbers. References to Respondent's Appendix below are designated "AA.", with the appropriate page numbers.

(b) A copy of the judgment in the Government's condemnation suit in the Texas Federal District Court, which revested title to the Padre Island land in the Respondent (Exhibit C to Petitioners' Complaint), (AA. 236a-246a);

(c) The opinion of the Texas Court of Civil Appeals in *Fisher* v. *Kerlin*, 279 S. W. 2d 637 (1955);

(d) Certified copies of the Texas judgment (AA. 13a-45a) fixing the extent of the Petitioners' rights under their written quitclaim deed to the Respondent, Kerlin (A. 18a-27a);

(e) Certified copies of two written oil and gas leases, filed of record in Texas (AA. 117a-154a); and

(f) Other undisputed documents set out in Respondent's affidavits in support of the motion (see Appdx. II, 14a).

As to all of the foregoing, there was and could be no dispute or any substantial controversy. And this documentary material, was and is, as available to the Petitioners as to the Respondent. After the respective rights of the parties under the quitclaim deed had been determined by the Texas judgment, the present action presented a comparatively simple accounting problem, easily determined from the documents, as both courts below have found and determined.

As for Petitioners' Supplemental Complaint, filed in this action after entry of the Texas judgment, in a desperate effort, *somehow*, to keep this litigation alive, it was plainly without merit, in fact or law, as the courts below have also determined.

In those four Supplemental Counts, based on the bringing of the Texas action by Respondent, Petitioners sought to charge Respondent with breach of an alleged trust, a conspiracy to breach the alleged trust, malicious prosecution, and slander of Petitioners' title to the Texas lands. And, the relief sought, was recovery of Petitioners' attorney's fees, interest, and general, special and punitive damages in amounts not specified.

Being without merit, of any sort, in law or fact, those Supplemental Counts were properly dismissed.

POINT II

This petition, wholly without merit and frivolous, should be denied, with some appropriate admonition to petitioners, and with costs to respondent, including attorney's fees in all the courts.

Petitioners assert "that the American courts have all too often given the American public only *theoretical* justice, not *actual* justice" (Pet. 14).

And Petitioners contend, further, that certiorari should be granted here, because (Pet. 15):

> "The Court of Appeals has abused its power by deciding the principal issue of fact adversely to Petitioners *without any justification whatsoever in the record.*" (Italics by Petitioners.)

But Petitioners make no reference to the record to support this startling conclusion. Similarly without

record references, Petitioners assert (Pet. 17) that this case offers:

> ". . . the perfect illustration of an Appeals Court's opinion which is based upon 'facts' which never existed and issues of law which were never raised and upon 'admissions' which were never made by the litigants."

They state, further, that certiorari should be granted (Pet. 17-18):

> "Because it is the failure of the Courts of Appeals [referred to generally it seems] to grant litigants procedural due process of law in the sense here complained of which is the real reason for the breakdown in *actual* as distinguished from *theoretical* justice in this country." And that the granting of the writ prayed for will "be an electrifying improvement in *actual* as distinguished from *theoretical* justice in the U.S.A." (Italics by Petitioners; matter in brackets ours)

Although appearing here "*pro se*", the Petitioners are well able to employ counsel, and that they are persons of unreasonably extreme litigious proclivities, the following cases establish (*Humble Oil & Refining Co.* v. *Fisher, et al.*, 253 S. W. 2d 656 (Texas, 1953), cert. denied 345 U. S. 970; *Humble Oil & Refining Co.* v. *Atwood, et al.*, 244 S. W. 2d 637 (Texas, 1952); *Atwood* v. *Kleberg, Humble Oil & Refining Co., et al.*, 133 F. 2d 69 (5 Cir. 1943), sustained on rehearing, 135 F. 2d 452 (5 Cir. 1943), cert. denied, 320 U. S. 744; *Atwood* v. *Kleberg, et al.*, 163 F. 2d 108 (5 Cir. 1947), cert. denied 332 U. S. 843; *In re Joslyn*, 102 F. S. 521

(N. D. Ill. E. D., 1951), aff'd 198 F. 2d 673 (7 Cir. 1952), cert. denied, 345 U. S. 905; *Joslyn* v. *Joslyn*, 337 Ill. App. 443, 449, 457, 86 N. E. 2d 367, 381-383 (1949), Appeal denied, 341 Ill. App. Appdx. XIV).

At some point, we respectfully submit, an end must be placed by our courts to unwarranted and baseless litigation. Otherwise their crowded calendars will continue clogged to the end of time—however hard the Judges may work and despite all admonitions that "the only justice is speedy justice".

As Honorable Sylvester J. Ryan stated in the District Court, two years ago (Pet. Appdx. II, 23a):

> "It is time this litigation come to an end."

It is respectfully suggested that the present application for certiorari presents an unusually good opportunity for this Court to establish a useful precedent, which in the future might discourage baseless litigation and appeals.

POINT III

The petition for certiorari should be denied, with such terms imposed as to this Court may seem just.

Dated: July 6, 1959

Respectfully submitted,

MacIlburne Van Voorhies
Counsel for Respondent.